IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REFERENCE No. 3 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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LILADHAR KARUNASHANKAR TRIVEDI.
Versus
MINAXIBEN BHAGWANDAS TRIVEDI & 7 Others.

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Appearance :
MrJR NANAVATY, SR. ADVOCATE WITH Mr MEHUL H RATHOD for the Appellants.
None for Respondents 1, 2 and 4 to 8.
Mr HRIDAY BUCH for Respondent 3.

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CORAM : HONOURABLE MR.JUSTICE A. L. DAVE

and

HONOURABLE MR.JUSTICE S. D. DAVE

Date : 23/10/2007

ORAL JUDGMENT:- **(Per : A. L. DAVE, J.)**

1. This matter is placed before us by virtue of an order passed by the Honourable the Chief Justice pursuant to an order passed by learned Single Judge in Second Appeal No.114 of 2006 on 18.9.2006, wherein a question arose as to whether a second appeal would be maintainable in view of provision contained in Section 299 of the Indian Succession Act, which provides for only one appeal. According to the learned Single Judge, the provisions contained in Section 24 of the Gujarat Civil Courts Act and Section 299 of the Indian Succession Act run repugnant to each other and unless there is an amendment in the Indian Succession Act, it would be doubtful whether such Second Appeal would be maintainable? Therefore, the matter is placed for consideration of the question before this Division Bench.

2. We have heard learned Senior Advocate, Mr. J. R. Nanavaty, appearing with Mr. Mehul Rathod, learned Advocate, Mr. Hriday Buch and learned Additional Advocate General, whom we had called upon to address us, on the issue, it being of general importance and relates to interpretation of the provision of law.

3. Before adverting to the discussion on the subject and before addressing the question posed before us, it would be appropriate, if certain provisions of law, which are very relevant,

are quoted here.

3.1 Section 24 of the Gujarat Civil Courts Act, 2005 reads as under :-

> *"24. (1) The High Court may by general or special order invest any Senior Civil Judge, within such local limits and subject to such pecuniary limitation as may be specified in such order, with all or any of the powers of a District Judge or a Court of District Judge, as the case may be, under the Divorce Act, 1869, the Succession Act, 1925, the Special Marriage Act, 1954, or the Guardians and Wards Act, 1890.*
>
> *(2) Every order made by a Senior Civil Judge by virtue of the powers conferred upon him under sub-section (1) shall be subject to an appeal to the High Court where the amount or value of the subject matter exceeds rupees five lakhs or to the Court of District Judge where the amount or value of the subject matter does not exceed rupees five lakhs.*
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> *(3) Every order of a Court of District Judge passed on appeal under sub-section (2) from the order of a Senior Civil Judge shall be subject to an appeal to the High Court under the rules contained in the Code applicable to appeals from appellate decrees."*

3.2 Section 299 of the Indian Succession Act, 1925 reads as

under:-

> *"299. Appeals from orders of District Judge.- Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908) applicable to appeals."*

3.3 Section 266 of the Succession Act reads as under :-

> *"266. District Judge's powers as to grant of probate and administration.- The District Judge shall have the like powers and authority in relation to the granting of probate and letters of administration, and all matters connected therewith, as are by law vested in him in relation to any civil suit or proceeding pending in his Court."*

3.4 Section 100 of the Code of Civil Procedure reads as under:-

> *"100. Second appeal.-(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.*

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

4. According to Mr. J. R. Nanavaty, the appellant himself was under doubt and, therefore, he had preferred a petition under Articles 226 and 227 of the Constitution, which was converted into a second appeal. Mr. Nanavaty submitted that the Indian Succession Act provides for only one appeal and Section 24 of the Gujarat Civil Courts Act, if read, would mean that, by this

enactment, a second appeal is provided against an appellate decree of the District Court. The Indian Succession Act is a Central Act and, if the provisions are found to run repugnant to each other, the Central Act has to prevail because the Gujarat Civil Courts Act ("Gujarat Act") has not received the assent of the President. According to him, the application for probate ought to have gone to the District Judge and not the Civil Judge, as provided under the Indian Succession Act and, therefore, he expressed an opinion that Second Appeal would not be maintainable at law.

5. Learned Advocate, Mr. Hriday Buch, submitted that, as such, there is no conflict between these two provisions. Section 24 of the Gujarat Act also provides for an appeal from order of the District Court and Section 299 of the Succession Act also provides for an appeal. Both the provisions provide that an appeal from any order of the District Judge and it cannot be read so as to restrict the right to one appeal. Mr. Buch submitted that there is no challenge to Section 24 of the Gujarat Act and as long as there is no challenge to it, it has to be accepted as it stands on statute book and implemented. He submitted that, if both the provisions are read as submitted by him, there would be a harmonious and objective reading and interpretation of the provisions. He submitted that when there is no express exclusion of applicability of the Code of Civil Procedure, it cannot be inferred to mean that the Code is not applicable. He submitted that Section 100 of the Code of Civil Procedure also makes an order of the District Court appealable subject to certain restrictions. In support of this submission of his, he relied on ***M/s I.T.I. Limited v. M/s Siemens Public***

Communications Network Ltd., AIR 2002 SC 2308.

5.1 Mr. Buch submitted that second appeals are being entertained by this Court for a long time and it should receive consideration on merits, as a rule of practice and procedure. Relying on the case between ***National Sewing Thread Co. Ltd. v. James Chadwick & Bros., AIR 1953 SC 357***, he submitted that, ordinarily, after an appeal reaches the High Court, it has to be determined according to the rules of practice and procedure of that Court. He submitted, therefore, that the reference should be answered accordingly.

6. Learned Additional Advocate General, Mr. Joshi, submitted that the reference relates to only Second Appeal. The repugnancy, if any, relates only to Section 24(3) of the Gujarat Act. He submitted that Section 24 is not under challenge. Section 24 decides the forum of appeal whereas Section 299 decides the right of appeal. Both of them operate in different spheres. Section 299 relates only to appeals and question of second appeal, which is referred to, cannot be decided on the basis of this provision. Mr. Joshi submitted that when there is no challenge to Section 24 and when it remains on the statute book, it has to be implemented. The wider issues raised by learned Senior Advocate, Mr. Nanavaty, can be examined on some other appropriate occasion. According to learned Additional Advocate General, Second Appeal would be maintainable. He submitted that the reference may be answered accordingly.

7. We have considered the contentions.

8. Sub-section (1) of Section 24 authorises the High Court to confer power upon Senior Civil Judges which otherwise are vested in or exercised by the District Judge under special statutes, particularly, the Indian Succession Act and, undisputedly, Senior Civil Judges are invested with such powers.

8.1 Section 24(2) relates to the form of appeal dependent upon the valuation of the subject matter, namely, if the value of the subject matter exceeds Rs.5 lakhs, every order made by the Senior Civil Judge is appealable to the High Court and in other cases to the Court of the District Judge.

8.1.1 Section 24(3) provides that every order of the Court of District Judge passed on an appeal under sub-section (2) from the order of Senior Civil Judge shall be subject to a an appeal to the High Court under the rules contained in the Code applicable to appeals from appellate decrees.

8.1.2 Section 24(3) is the cause of reference because, according to learned Single Judge, Section 299 of the Succession Act provides for only one appeal. However, if that provision is read, significantly, it makes every order made by a District Judge by virtue powers conferred upon him subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure.

8.1.3 Therefore, both Section 24(3) of the Gujarat Act and Section 299 of the Succession Act make every order of the Court of District Judge subject to appeal to the High Court, as per the provisions of the Code of Civil Procedure.

8.1.4 The question that would arise would be whether term "*every order*" used in Section 299 would include every order passed on an appeal contemplated by sub-section (2) of Section 24 of the Gujarat Act from the order of the Senior Civil Judge and the answer, in our opinion, has to be in the affirmative for the reason that the Succession Act does not provide for investing any Senior Civil Judge with the powers of a District Judge or Court of District Judge under the said Act and when the law was enacted, such situation may not have been contemplated. That apart, if Section 299 of the Succession Act is read, it makes every order made by the District Judge under the Act appealable and if the provisions of Section 24 and Section 299 are to be read harmoniously, it has to be given a meaning so as to include the order by the District Court in appeal over the orders of Senior Civil Judge, who is invested with the powers under the Succession Act by virtue of Section 24(1) of the Gujarat Act. Even otherwise, if words *"every order"* appearing in Section 299 are given their literal meaning, they would take in their sweep the order passed in appeal. Section 299 cannot be read so as to mean that it restricts the right of appeal to only one appeal. Words 'Every Order' appearing in Section 299 cannot be read by inserting words 'in original proceedings' so as to exclude orders passed in an appeal. It would be appropriate to refer to the decision of the Apex Court in *M/s I.T.I. Limited (supra)*,

where it is observed that when there is no express exclusion of remedy under Section 115 of the Code of Civil Procedure, it cannot be held by inference that such right does not exist, though even applicability of the Code is under controversy. Section 299 can be said to deal with right of first appeal. Exclusion of right of Second Appeal cannot be read in Section 299. Therefore, it is not possible to hold that Section 299 speaks of only one appeal to exclude Second Appeal and that the Act prohibits such appeal.

8.2 It is also to be noted that Section 299 of the Succession Act makes every order of the District Judge passed by virtue of powers under the Act subject to appeal to High Court in accordance with the provisions of the Code of Civil Procedure applicable to appeals. Section 100 of the Code of Civil Procedure also provides for an appeal over decree passed in appeal by a Court subordinate to the High Court subject of course to certain restrictions.

9. If the provisions of the Succession Act and the Gujarat Act referred to above are read together, they would only convey a meaning that an order passed by District Judge or Court of District Judge is subject to appeal to the High Court and would be governed by the Code of Civil Procedure. Section 100 of the Code provides for similar appeal, but subject to certain restrictions stated therein. As a result, in our opinion, it has to be held that an appeal over an order passed by District Judge or Court of District Judge passed in an appeal over an order of the Senior Civil Judge in exercise of power under the Indian Succession Act would be maintainable before the High Court subject to the provisions of the Code of Civil

Procedure. In our view, there is no conflict, no disharmony or repugnancy between the provisions contained in Section 24 of the Gujarat Act and Section 299 of the Succession Act, if they are given a harmonious and objective construction/interpretation.

10. It cannot be overlooked that Section 24 of the Gujarat Act is not under challenge and it still remains on statute book. The same is enacted considering the local requirements in its wisdom by the Legislature and, in absence of any startling conflict, has to be read harmoniously.

11. In our view, therefore, there is no need going into the larger questions raised by learned Advocate, Mr. Nanavaty, as to Articles 245, 246 and 254, conflict between State and Central Legislature, etc., having found that there is no conflict or repugnancy between the two provisions.

12. We hold that second appeal would be maintainable before the High Court to challenge the order/decree of District Judge or Court of District Judge made or passed by virtue of the powers under the Indian Succession Act as read with Section 24 of the Gujarat Civil Courts Act, 2005.

13. The question raised by the learned Single Judge in order dated 18.9.2006 is answered accordingly.

14. The second appeal shall now be required to be placed before the appropriate Court for decision on merits. The Registry to

take steps.

[A. L. DAVE, J.]

[S. D. DAVE, J.]

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